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09/780,073	02/09/2001	William P. Apps	RPC 0557 PUS	7630

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EXAMINER

CASTELLANO, STEPHEN J

ART UNIT PAPER NUMBER

3727

DATE MAILED: 04/21/2004

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GROUP 3700

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Paper No. 33

Application Number: 09/780,073
Filing Date: February 9, 2001
Appellant(s): APPS, WILLIAM P.

Konstantine Diamond
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed September 25, 2003.

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(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is incorrect.

The amendment after final rejection filed on August 4, 2003 has not been entered.

The amendment after final rejection filed on September 25, 2003 has been entered.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief is incorrect.

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The following is a correct statement of the issues on appeal:

- I. Whether claims 6, 8, 9 and 12 are anticipated under 35 U.S.C. 102 by Carroll (D239,213).
- II. Whether claims 6-18 and 21-26 are anticipated under 35 U.S.C. 102 by Apps (5,323,925).
- III. Whether claims 1-10, 12-15, 17-19 and 21-28 are unpatentable under 35 U.S.C. 103 over Carroll (D239,213).
- IV. Whether claim 8 is unpatentable under 35 U.S.C. 103 over Apps ('925) in view of David (4,079,077).
- V. Whether claims 11, 16 and 20 are unpatentable under 35 U.S.C. 103 over Carroll (D239,213) in view of Apps ('925).
- VI. Whether claims 1-28 are unpatentable under the judicially created doctrine of double patenting over Apps (D404,204).
- VII. Whether claims 1-28 are unpatentable under the judicially created doctrine of double patenting over Apps (6,186,328).
- VIII. Whether claims 13-18 and 21 are indefinite under 35 U.S.C. 112, second paragraph.

(7) Grouping of Claims

Appellant's brief includes a statement that claims 1-28 do not stand or fall together and provides reasons as set forth in 37 CFR 1.192(c)(7) and (c)(8).

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(8) *Claims Appealed*

A substantially correct copy of appealed claim 12-31 appears on pages 19-22 of the Appendix to the appellant's brief. The minor errors are as follows:

Claim 22, lines 9 and 10, "adjacent the parallel portions" has been deleted.

(9) *Prior Art of Record*

6,186,328	APPS	2-2001
D404,204	APPS	1-1999
5,232,925	APPS	6-1994
D239,213	CARROLL	3-1976
4,079,077	DAVID	3-1978

(10) *Grounds of Rejection*

The following ground(s) of rejection are applicable to the appealed claims:

Claims 13-18 and 21 are rejected under 35 U.S.C. 112, second paragraph. This rejection is set forth in prior Office Action, Paper No. 18.

Claims 6, 8, 9 and 12 are rejected under 35 U.S.C. 102(b) as being anticipated by Carroll. This rejection is set forth in prior Office Action, Paper No. 18.

Claims 6-18 and 21-26 are rejected under 35 U.S.C. 102(b) as being anticipated by Apps (5,323,925). This rejection is set forth in prior Office Action, Paper No. 18.

Claims 1-10, 12-15, 17-19 and 21-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Carroll. This rejection is set forth in prior Office Action, Paper No. 18.

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Claim 8 is rejected under 35 U.S.C. 103(a) as being unpatentable over Apps (5,323,925) in view of David. This rejection is set forth in prior Office Action, Paper No. 18.

Claims 11, 16 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Carroll in view of Apps (5,323,925). This rejection is set forth in prior Office Action, Paper No. 18.

Claims 1-28 are rejected under the judicially created doctrine of double patenting over claims 1-13 of Apps (6,186,328). This rejection is set forth in prior Office Action, Paper No. 18.

Claims 1-28 are rejected under the judicially created doctrine of double patenting over drawing figures 1-10 of Apps (D404,204). This rejection is set forth in prior Office Action, Paper No. 18.

(11) *Response to Argument*

112 Rejection:

The claim is confusing because the term “an uppermost edge of the band side detail” is used before phrase “the upper edge of the band side detail.” The metes and bounds of the claim should be clear and it can’t be determined if the uppermost edge of the band side detail is meant or if another upper edge of the band side detail is meant.

102 Rejection: Carroll

The portions of the outer zig-zag bands which attach the inner zig-zag band to the floor are the lowermost portion of the upright V-shape of the outer bands that forms a substantially trapezoidal shape with a bottom, short, parallel side flush with the bottom surface of the floor

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and a top, longer, parallel side flush with the top edges of lower horizontal portions the inner and outer bands. These trapezoidal shaped portions are perpendicular both when the band is viewed by a vertical, transverse cross section and when viewed from a plane parallel to the outer face of the outer band as the long side is directly above the short side. These trapezoidal portions from columns.

102 Rejection: Apps (5,323,925)

Appellant concludes that it is unreasonable to include post 20 as part of the normal definition of “band,” wherein “band” is defined as a thin strip of flexible material used to encircle and bind one object or to hold a number of objects together. The post 20 is integrally attached to the rail 16 and the post 20 is thin as it has a generally rectangular cross section with the thickness dimension being substantially smaller than the width dimension. Appellant fails to provide any reason for concluding that the post 20 is not of the band.

Appellant also concludes that the rail/post combination band is not contoured downwardly. Clearly, the post 20 extends downwardly. “Curved downwardly” has an entirely different meaning than “contoured downwardly.”

It is noted that the examiner abandoned this case due to an insufficient or incomplete brief as Groups B, C, and D did not have separate arguments. Appellant argues only that the “contoured downwardly” limitation is not provided.

103 Rejection: Carroll

Appellant states that the motivation of reducing weight and material is too vague. Reducing weight saves cost as compared with transporting heavier crates since less fuel for vehicle transport and less human power would be needed to manually transport and manipulate the crates. Reducing material reduces cost because less resin would need to be purchased to make the same number of crates.

103 Rejection: Apps in view of David

Appellant further concludes that the proposed V-shaped post would “even more clearly” not be part of the band. Again, the V-shaped structure when viewed in cross section is thin. Appellant’s conclusion is erroneous and without any basis.

103 Rejection: Carroll in view of Apps

Appellant alleges that structure removed by a previous modification apparently needs to be added back to the outer zig-zag band. The examiner is completely lost as to why appellant would make this rather bizarre assumption. Modification to add back structure previously removed is clearly not contemplated by the Carroll in view of Apps rejection as provided in paper 18.

Double Patenting Rejections:

Re the design patent rejection, Appellant states that the two-way test must compare the utility claims of the present invention must be compared to the claims of the design patent.

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Appellant doesn't believe that the claims of the design patent are the drawings. The examiner is under the impression that the claims of the design patent are the drawings.

The claims of both the utility patent (6,186,328) and the design patent (D404,204) are so similar to the claims of the present invention that minor obvious modifications of the claims of the patents or the present invention would yield the claims of the present invention or the patents, respectively.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



Stephen J. Castellano

Primary Examiner

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sjc

April 14, 2004

Conferees

lwy *lwy*

njn *njn*

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